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In the Supreme Court of the United States

OCTOBER TERM, 1979

HARRY ALEMAN and LEONARD FORESTA,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners Harry Aleman and Leonard Foresta, Defendants-Appellants in the court below, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case.

OPINION BELOW

The opinion of the Seventh Circuit, not yet reported, is printed in Appendix 1. No opinion was rendered by the District Court for the Northern District of Illinois.

JURISDICTION

The opinion and judgment of the Court of Appeals for the Seventh Circuit were entered on October 30, 1979. The court's judgment is attached hereto as Appendix 2. This Court's order of November 21, 1979 extending the time for filing a petition for writ of certiorari to and including December 28, 1979 is attached as Appendix 3.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Can persons who commit three home robberies over a fourteen month period constitute an "enterprise" under the Racketeer Influenced and Corrupt Organizations Act (18 U.S.C. §1962) even if no legitimate business is involved and no infiltration of any business has occurred?

2. Can a holding that the commission of three robberies is a violation of section 1962 be reconciled with the statute's legislative history, with general principles of statutory construction, and with this Court's expressed concern about altering sensitive federal-state relationships by transforming state offenses into federal felonies?

3. If 18 U.S.C. §1962 can be construed to cover the commission of three robberies where there is no infiltration of a legitimate business and no identifiable standards for determining which cases should be brought under section 1962 and which under underlying sections of Title 18 or state criminal law, is the statute unconstitutional

   (a) for vagueness and overbreadth; or

   (b) as a violation of petitioners' right to equal protection under the laws?

4. Do the principles of due process and double jeopardy foreclose imposition of multiple penalties for RICO violations and the underlying crimes?

5. Does refusal to sever counts charging transporting a weapon after having been convicted of a felony require reversal when the jury—despite an offer to stipulate to the prior conviction—is informed that the conviction is for the same underlying crime for which defendants are on trial?

CONSTITUTIONAL PROVISIONS AND RELEVANT STATUTES

The Fifth Amendment to the United States Constitution provides in part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

The Fourteenth Amendment to the United States Constitution provides in part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

18 U.S.C. §1962(c) provides:

> "(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."

18 U.S.C. §1962(d) provides:

> "(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section."

18 U.S.C. §1963(a) provides:

> "(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962."

18 U.S.C. §1961 provides in part:

> "(1) 'Racketeering activity' means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year. . . ."
>
> • • •
>
> "(4) 'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;
>
> (5) 'pattern or racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.)"

STATEMENT OF THE CASE

Petitioner Aleman was convicted by a jury on one count charging a substantive violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO") (18 U.S.C. §1962(c)), one count of conspiracy to violate the Act (18 U.S.C. §1962(d)), and one count of transporting stolen goods in interstate commerce (18 U.S.C. §2314). Mr. Aleman was found not guilty of causing his co-defendant to transport firearms in interstate commerce (18 U.S.C. §924 (b) and §2), and of causing his co-defendant to carry firearms during the commission of a felony (18 U.S.C. §924(c) (2) and §2).

Petitioner Foresta was convicted of the same three charges as Mr. Aleman; additionally, he was found guilty on counts charging transportation of a firearm in interstate commerce (18 U.S.C. §924(b)), carrying a firearm during the commission of a felony (18 U.S.C. §924(c)(2)), transporting a firearm in interstate commerce after having been convicted of a felony (18 U.S.C. §§922(g) and 924(a)), and possession of a firearm in commerce after having been convicted of a felony (18 U.S.C. §1202(a)(1)).

Mr. Aleman and Mr. Foresta were both sentenced to twenty years on each of the racketeering counts, to be served concurrently, and to ten years on the interstate transportation of stolen goods count, to be served consecutively. Additionally, Mr. Foresta was sentenced to concurrent terms of ten years and two years on the firearms charges.

Three home robberies formed the basis for the racketeering charges in this case. The indictment charged that petitioners,

> "being persons associated with an enterprise engaged in and the activities of which affected interstate commerce, to wit, a group of individuals associated in fact to plan and commit robberies, to carry away stolen goods, and to divide among themselves the stolen goods and all proceeds derived therefrom, unlawfully, willfully and knowingly did conduct and participate, directly and indirectly in the conduct of such enterprises' affairs through a pattern of racketeering activity, to wit, the commission of robberies in Chicago, Illinois, Oak Lawn, Illinois, and Indianapolis, Indiana."

As set forth in the opinion of the Seventh Circuit, the government's case against petitioners was based largely on the testimony of Louis Almeida, concededly a professional criminal, who was named in the indictment as an unindicted co-conspirator. (App. 1 at 3.) Almeida was granted immunity by the government for his testimony that Aleman and Foresta planned and carried out the three robberies. Several victims of the robberies testified, but their testimony was limited to identification of Almeida and Foresta; the witness from the only robbery at which Aleman was alleged to have been present did not identify Aleman as a participant.

In affirming petitioners' convictions, the Seventh Circuit held that the "broad language" of the racketeering act was not limited to the infiltration of legitimate business by criminal activity, but also could be used to "curb other criminal activities when the acts are part of an illegal enterprise." (App. 1 at 6.) The court stated that the Act was not restricted to members of organized crime, adding that the "pattern of racketeering" requirement was met here by a showing of two acts of racketeering activity—in this case the state crime of robbery. (App. 1 at 8.) The court rejected petitioners' contention that RICO should be deemed void for vagueness if it is read to include illegitimate businesses, stating that "being broad in scope is not synonymous with being vague." (App. 1 at 12.) Similarly, the court rejected petitioners' argument that RICO violated their right to equal protection because of the discretion permitted the prosecutor to charge a RICO offense or select only an underlying crime. (App. 1 at 12-13.)

In dissent, Judge Swygert agreed with petitioners' view of the term "enterprise" as used in the RICO statute, citing his extensive discussion in *United States* v. *Grzywacz,* 603 F.2d 682, 690 (7th Cir. 1979):

> "To urge, as the Government did in *Grzywacz,* that a police department is an 'enterprise' within the meaning of the statute, although farfetched and impermissible by any reasonable interpretation of the statute, has some semblance of logic to it. Here, to maintain, as the majority does, that the pattern of criminal activity engaged in by Aleman and his associates is an 'enterprise' within the meaning of the statute is to turn logic on its head." (App. 1 at 24.)

Judge Swygert noted that, to reach the majority's conclusion, "we are required to assume that the defendants were infiltrating their own unlawful enterprise through a 'pattern of racketeering activity.'" (App. 1 at 24.) Judge Swygert concluded that the recent Sixth Circuit opinion in *United States* v. *Sutton,* 605 F.2d 260 (6th Cir. 1979), correctly decides this very issue, offering an analysis that is "irrefutable." (App. 1 at 25.)

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD RESOLVE THE IMPORTANT RICO ISSUES PRESENTED BY THE INSTANT CASE SINCE THERE IS A DIRECT CONFLICT AMONG THE CIRCUITS AND THE STATUTORY INTERPRETATION ADOPTED BY THE COURT BELOW VIOLATES FUNDAMENTAL RULES OF CONSTRUCTION.

Introduction

The Racketeer Influenced and Corrupt Organizations Act, passed nearly a decade ago, is one of the most onerous penal statutes in the Federal Code. It not only provides for criminal penalties of up to twenty years for substantive violations, but it also provides for a possible twenty year additional penalty for conspiracy to violate the Act, as well as for civil forfeiture penalties. Additionally, a person may—as in the present case—receive additional consecutive sentences for underlying crimes which form the basis for the RICO counts.

RICO makes it unlawful for persons "associated with any enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. §1962(c). "Racketeering activity" includes, *inter alia,* robbery; the commission of two or more acts of racketeering establishes a "pattern of racketeering activity." 18 U.S.C. §1961(1), §1961(5). The principal issue in this case is whether Aleman's and Foresta's involvement in three robberies was an "enterprise" which was conducted "through a pattern of racketeering activity."

The term "enteprise" in section 1961 must be interpreted to mean a legitimate business organization. To hold otherwise, as did the court below, eliminates the requirement that the prohibited "racketeering activity" relate to "the conduct of such enterprise's affairs." If robbery, which is a defined "racketeering activity," is also an "enterprise" under the statute, RICO redundantly and incomprehensibly proscribes "any person . . . associated with any [robbery] . . . [from] conduct[ing] or participat[ing], directly or indirectly, in the conduct of such [robbery's] affairs through a pattern of [robbery]." If this construction of RICO is deemed correct, the statute is void for vagueness and for its denial to petitioners of equal protection.

There is a direct conflict among the lower federal courts in the application of this increasingly-used criminal statute. Even courts adopting an expansive view have recognized that RICO has been carried far beyond its stated legislative purpose. Whether or not this Court ultimately adopts the construction of RICO which petitioners (and the Sixth Circuit) believe is mandated by common sense and legislative history, the issue is undeniably an important one which must be addressed by this Court.*

If petitioners' convictions can be upheld, there is virtually no limit to the widening web spun by RICO. To call petitioners' activities a "business"—as the Seventh Circuit did—stretches the definition of that word; to declare it an "enterprise" under RICO is patently absurd in light of the statute's language and legislative history. Not only does the present case present this Court with one of the most extreme examples of the use—or misuse—of RICO, but it

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* Thus far, this Court has mentioned it only in *dicta. See Iannelli* v. *United States,* 420 U.S. 770, 787, n.19 (1975).

also presents the important related question of pyramiding of penalties; both petitioners were sentenced to consecutive terms for RICO violations and for a crime underlying the RICO counts—and petitioner Foresta had previously been sentenced by a state court for one of the same robberies forming the basis for the RICO charges. Thus, this case—more than any yet decided—presents the sensitive problem of federal-state relations, about which this Court has often expressed concern.

The time has come for a definitive declaration by the highest court of the land as to the reach of this highly controversial statute. The opinion below presents the most far-reaching interpretation imaginable since it would apply RICO whenever two of the crimes listed in section 1961(1) are committed within ten years of each other. (See Judge Swygert's dissent, App. 1 at 24.) This petition thus provides an ideal case for this Court to consider what, if any, limitations should be placed on this important statute.

A.

This Court Should Resolve The Conflict Among The Circuits On The Interpretation Of §1962.

The conflict among the circuits relating to the interpretation and limitations of the RICO statute has resulted in a lack of uniformity in the application of this important and highly penal federal criminal statute.

In one of the more expansive readings of section 1962, the Fifth Circuit in *United States* v. *Elliott,* 571 F.2d 880 (5th Cir.), *cert. denied sub nom. Delph* v. *United States,* 439 U.S. 953 (1978), held that a group of people who committed crimes including arson, murder, and truck hijackings constituted an "enterprise" under RICO. See also, *e.g., United States* v. *Diecidue,* 603 F.2d 535 (5th Cir. 1979);

United States v. *Morris,* 532 F.2d 436 (5th Cir. 1976); *United States* v. *Hawes,* 529 F.2d 472 (5th Cir. 1976).

The Second and Ninth Circuits have also given RICO a very broad application. *United States* v. *Rone,* 598 F.2d 564 (9th Cir. 1979), (RICO conviction upheld in a case involving murder and extortion, but no legitimate business); *United States* v. *Altese,* 542 F.2d 104 (2d Cir. 1976), *cert. denied sub nom. Napoli* v. *United States,* 429 U.S. 1039 (1977), (illegal gambling activities). See also *United States* v. *Campanale,* 518 F.2d 352, 364 (9th Cir. 1975), *cert. denied,* 423 U.S. 1050 (1976); *United States* v. *Parness,* 503 F.2d 430, 441-42 (2d Cir. 1974), *cert. denied,* 419 U.S. 1105 (1975).*

The Seventh Circuit has previously held that a criminal "enterprise" falls within the ambit of the RICO statute. In *United States* v. *Cappetto,* 502 F.2d 1351, 1358 (7th Cir. 1974), *cert. denied,* 420 U.S. 925 (1975), the court stated that Congress 'intended to prohibit any pattern of racketeering activity in or affecting commerce." And in *United States* v. *Grzywacz,* 603 F.2d 682 (7th Cir. 1979), a case involving corruption by public officers using their official positions for personal gain, the court held that the Madison, Illinois Police Department and individual officers constituted an "enterprise" within the meaning of the racketeering statute.

These decisions directly conflict with the decision of the Sixth Circuit in *United States* v. *Sutton,* 605 F.2d 260 (6th

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* In *United States* v. *Swiderski,* 593 F.2d 1246 (D.C. Cir. 1979), *cert. denied,* 99 S.Ct. 2055, 2056 (1979), the District of Columbia Court of Appeals indicated in *dicta* its acceptance of a broad interpretation of "enterprise," stating that illegitimate business activities are covered by the RICO statute as well as activities of legitimate organizations.

Cir. 1979).* In that case, the Sixth Circuit addressed the question of whether §1962 may be applied to persons engaged in racketeering activity unrelated to any legitimate organization but in furtherance of "a criminal enterprise." (605 F.2d at 266.) In stark contrast to the opinion of the Seventh Circuit in the present case and the other cases cited above, the Sixth Circuit refused to expand the meaning of the term "enterprise" beyond the words of the statute and its legislative intent.

In *Sutton,* the defendants were charged with conducting a pattern of racketeering in connection with a property fencing operation and a heroin distribution business. The court carefully analyzed the racketeering statute, holding that the government's "deceptively literal treatment of the statutory definition of the term 'enterprise' in essence 'read[s] the 'enterprise' element entirely out of the statute." (605 F.2d at 265.) The court noted that every individual or group of individuals considered in the abstract could not be an "enterprise"; individuals could become enterprises only in relation to something which they do. The court thus concluded that the statutory definition of "enterprise" in §1961(4) is incomplete because it does not tell what that "something" is. (605 F.2d at 266.)

The Sixth Circuit found the text of the RICO statute of no assistance in determining the standard as to what constitutes a criminal enterprise. The court noted the Fifth Circuit's description of a criminal enterprise as "an amoeba-like infra-structure that controls a secret criminal network," but stated that greater precision is required to avoid violating "the first essential of due process of

* The Sixth Circuit has granted the government's request for a rehearing *en banc*. The parties have been asked to submit their briefs by the end of December, 1979, with oral argument scheduled for February, 1980.

law" by forbidding "the doing of an act in terms so vague that [persons] of common intelligence [would] necessarily [have to] guess at its meaning and differ as to its application." (605 F.2d at 266.) The court added:

> "Although government prosecutors may be trained nowadays to recognize an 'amoeba-like infra-structure' when they see one, our instincts are not so keenly developed, and we think even racketeers are entitled to know before the fact at what point their criminal activities will be deemed sufficiently 'amoeba-like' to transgress the statute." (605 F.2d at 266.)

In attempting to find standards for application of the statute, the *Sutton* court turned to the legislative history of the Act, concluding that RICO was enacted in response to the growing subversion of legitimate institutions of business and labor by organized crime. The court rejected the contention that limiting RICO to the corruption of legitimate enterprises leaves a senseless "loophole" for illegitimate businesses, noting that so called "illegitimate businesses" are already "comprehensively proscribed and severely punished by the many provisions of state and federal law listed under RICO's definition of 'racketeering activity.'" (605 F.2d at 268.)

In support of its decision, the Sixth Circuit cited the judicial canon of resolving ambiguity in favor of lenity unless the legislature has spoken "plainly and unmistakeably" to the contrary (relying upon *Rewis* v. *United States,* 401 U.S. 808, 812 (1971), and *United States* v. *Gradwell,* 243 U.S. 476, 485 (1917)), adding that "'unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.'" *United States* v. *Bass,* 404 U.S. 336, 349 (1971)." 605 F.2d at 270.)

In *United States* v. *Moeller,* 402 F. Supp. 49, 58-60 (D. Conn. 1975), the court thoughtfully analyzed the question

of whether RICO could apply in a case which did not involve a legitimate business. The indictment in *Moeller* alleged that the "enterprise" under section 1962(c) was a group of individuals associated for the purpose of burning and destroying buildings. The court noted that the statutory definition of "enterprise" contains no words of limitation concerning the lawfulness of activities, but stated that the legislative history provided "the clearest indication" that Congress intended "enterprise" to mean legitimate businesses. (402 F. Supp. at 58.) The court recognized that Congress may have power to extend federal criminal jurisdiction far enough to encompass the activity in that case, but held that it should take a clear indication of legislative intention before such a sweeping purpose is attributed to it. See also *United States* v. *Mandel,* 415 F. Supp. 997, 1020-22 (D.Md. 1976).

In *Iannelli* v. *United States,* 420 U.S. 770 (1975), this Court discussed the purpose of the Organized Crime Control Act of 1970, specifically §1955, but noted the following relating to Title IX:

> "Additionally, Title IX, codified in 18 U.S.C. §§1961-1968, seeks to prevent the infiltration of legitimate business operations affecting interstate commerce by individuals who have obtained investment capital from a pattern of racketeering activity. See §1962." (420 U.S. at 787, n.19.)

Thus, *in dictum,* this Court has expressed its understanding of the scope of the anti-racketeering statute, consistent with petitioners' view.

Even in the circuits which have applied RICO to general criminal conduct without regard to the involvement of legitimate businesses, several judges have expressed strong dissents. See *e.g., United States* v. *Rone,* 598 F.2d 564, 573-74 (9th Cir. 1979), Ely, J., dissenting; *United States* v. *Grzywacz,* 603 F.2d 682, 690-92 (7th Cir. 1979), Swygert, J., dissenting; *United States* v. *Altese,* 542 F.2d 104, 107-11 (2d Cir. 1976), Van Gaafeiland, J., dissenting, *cert. denied,* 439 U.S. 1039 (1976). There is a considerable difference of opinion among federal judges on the interpretation of RICO. This court should resolve that difference in the interest of uniform application of federal penal laws. The conflict between the circuits concerning the scope of this increasingly used* statute is now ripe for determination by this Court.

B.

This Court Should Limit Application Of Section 1962 To Racketeering Activity In The Conduct Of Legitimate Businesses, Consistent With Its Legislative History.

Section 1962 is part of Title IX of the Organized Crime Control Act of 1970. Title IX is entitled "Racketeer Influenced and Corrupt Organizations," and consists of sections 1961-1968. Reports from the United States Senate and the House of Representatives demonstrate the legislative intention that section 1962 apply to the infiltration by organized crime of legitimate organizations.

The Senate Report** states that Title IX "has as its purpose the elimination of organized crime and racketeer-

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* See Atkinson, *"Racketeer Influenced and Corrupt Organizations,"* 18 U.S.C. §§1961-68: *Broadest of the Federal Criminal Statutes,* 69 J.Crim.L.&C. 1, 3 n.21 (1978); Note, *Coverage and Application of the Organized Crime Control Act of 1970: The Anti-Racketeering Statute in Operation,* 53 Chi.-Kent L. Rev. 498 (1977); National Law Journal, Sept. 17, 1979, at 1, 13.

** Senate Committee on the Judiciary, Report on Organized Crime Control Act of 1969, S.Rep. No. 617, 91st Cong., First Session (1969).

ing into legitimate organizations operating in interstate commerce." Similarly, the Report of the House of Representatives on the Organized Crime Control Act of 1970* states that "Section 1962 establishes a three-fold prohibition aimed at stopping the infiltration of racketeers into legitimate business organizations."

Numerous quotations from the Senate and House Reports and Hearings demonstrate that section 1962 was not intended to encompass illegal enterprises where there is no effect on legitimate businesses. For example:

> Senator Hruska (Co-Sponsor of Act): "Title IX is designed to remove the influence of organized crime from legitimate business." (116 Cong. Rec. at 602.)
>
> Congressman Cellar (Chairman of the House Subcommittee on the Judiciary that considered the Act): "As I understand Title IX it combines criminal and civil penalties which are directed towards organized crime infiltration of legitimate business." (House Hearings, at 188.)
>
> Congressman Anderson: "Title IX is aimed at keeping organized crime out of legitimate business through the use of both criminal and civil penalties." (116 Cong. Rec. 35319.)
>
> Remarks of Congressman St. Germain: "Title IX is aimed at keeping organized crime out of legitimate business through the use of both civil and criminal penalties." (116 Cong. Rec. 35200.)
>
> Remarks of Congressman Railsback: [In regard to Title IX] "This title is designed to deal with the infiltration of organized crime into legitimate business and labor." (116 Cong. Rec. 35304.)

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* House Report No. 91-1549, U.S.C. Cong. and Admin. News, 91st Cong., Second Session (1970) at 4007, 4003.

In a law review article, Senator John L. McClellan, sponsor of the Organized Crime Control Act, which encompasses section 1962, analyzed each title of the Act, explaining that "Title IX [§§1961-1968] is aimed at removing organized crime from our legitimate organizations." McClellan, *The Organized Crime Act (S. 30) Or Its Critics; Which Threatens Civil Liberties?*, 46 Notre Dame Lawyer 55, 141 (1970).*

This Court has held that legislative intent should be considered in construing statutes. See *e.g., Philbrook* v. *Glodgett,* 421 U.S. 707, 713-14 (1975); *Holy Trinity Church* v. *United States,* 143 U.S. 457, 472 (1892). Furthermore, this Court has held and frequently reiterated that, in criminal cases, any uncertainty regarding statutory language should be resolved in favor of the defendant. *Rewis* v. *United States,* 401 U.S. 808, 812 (1971); *United States* v. *Campos-Serrano,* 404 U.S. 293, 297 (1971); *United States* v. *Bass,* 404 U.S. 336, 347-48 (1971).

Another factor which militates against the broad construction of RICO espoused by the Seventh Circuit is the danger of construing federal criminal statutes broadly so as to affect "sensitive federal state relationships" "transform[ing] relatively minor state offenses into federal felonies." See *Rewis* v. *United States,* 401 U.S. 808, 812 (1971); *United States* v. *Mandel,* 415 F.Supp. 997, 1020-

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* The opinion below (App. 1 at 6-7) quotes extensively from this article to establish that the offenses listed in the act as "racketeering activities" are not limited to offenses committed primarily by organized crime. The issue, however, is not whether the "racketeering activity" must be an organized crime activity. The issue is whether the "enterprise" conducted through "racketeering activity" must be a legitimate enterprise. The Senator's discussion contains nothing which supports the Seventh Circuit's construction of the term "enterprise."

22 (D.Md. 1976). Wholesale conversion of state crimes into federal offenses hardly seems desirable in view of the congested dockets facing many of the federal district courts. Yet the decision below converts any two robberies committed within ten years of each other into a RICO offense where there is any interstate commerce connection.

Further, the well established doctrine of *ejusdem generis* warns against expansively interpreting broad language which immediately follows narrow and specific terms. *United States* v. *Insco,* 496 F.2d 204, 206 (5th Cir. 1974); *United States* v. *Baranski,* 484 F.2d 556, 566 (7th Cir. 1973). Since the broad phrase "[any] group of individuals associated in fact although not a legal entity," appearing in §1961(4) is preceded by narrower terms such as "union," "partnership" and "corporation," and because these terms suggest a "legitimate" connotation, the doctrine of *ejusdem generis* militates in favor of a narrow definition of "enterprise."

This Court should grant certiorari to determine whether the Seventh Circuit and other courts have disregarded fundamental principles of statutory construction in applying RICO to the facts of this and similar cases.*

C.

If RICO Is Not Limited To Cases Involving Legitimate Enterprises, The Statute Should Be Declared Unconstitutional.

In *Connally* v. *General Construction Company,* 269 U.S. 385, 391 (1926), this Court enunciated a basic tenet of criminal law:

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* See Comment, Organized Crime and the Infiltration of Legitimate Business—Civil Remedies for "Criminal Activity," 124 U.Pa.L. Rev. 192 (1975).

> "A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."

This Court has frequently reiterated that criminal prohibitions must be clearly defined to adequately apprise persons of the criminal consequences of their conduct. *Smith* v. *Goguen,* 415 U.S. 566, 574 (1974); *United States* v. *Universal C.I.T. Credit Corp.,* 344 U.S. 218, 224 (1952); *Lanzetta* v. *New Jersey,* 306 U.S. 451, 453 (1939). *See also, Papachristou* v. *City of Jacksonville,* 405 U.S. 156, 162 (1972).

At least one Circuit Court of Appeals and two District Courts have found that the statute is too vague to adequately apprise persons of the possible criminal consequences of their acts. *United States* v. *Sutton, supra; United States* v. *Moeller, supra; United States* v. *Mandel, supra.* In addition, the dissents in the cases cited above (pp. 14-15, *supra*), exemplify the difficulties judges have had in determining the reach of the RICO statute. If numerous judges—all learned in the law—are unable to agree on the scope of the RICO statute, ordinary persons with no legal training cannot be held to a higher standard. Unless the term "enterprise" is limited as the legislative history of the statute indicates it should be, the statute is void for vagueness and overbreadth and must be declared unconstitutional.

If held applicable to any acts of "racketeering" involving interstate commerce, the statute is not only unconstitutionally vague and overbroad, but it also places unbridled discretion in the police and prosecutors in determining the acts and parties to be charged under it. Statutes which effectively allow policemen and prosecutors to make such

judgments have been held unconstitutional by this Court since "legislatures may not so abdicate their responsibility for setting the standards of criminal law." *Smith* v. *Goguen,* 415 U.S. 566, 574 (1974); *Papachristou* v. *City of Jacksonville,* 405 U.S. 156 (1972).

It has generally been held that a prosecutor has considerable discretion in determining whether to bring an indictment against an individual. However, giving him the unfettered discretion to determine whether a defendant should be charged with a RICO violation carrying the penalty of 20 years incarceration—as opposed to an underlying offense which may carry a penalty of 5 to 10 years*—unconstitutionally subjects individuals to the whim of the prosecutor, denying defendants their right to equal protection under the Fourteenth Amendment to the United States Constitution.** Cf. *Yick Wo* v. *Hopkins,* 118 U.S. 356 (1886); *United States* v. *Falk,* 479 F.2d 616, 624 (7th Cir. 1973).

Thus, even if the opinion below is correct in its broad application of RICO, this Court should review the case to determine whether a statute so broad in scope and so vague in its application transcends constitutional limitations.

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* Section 1962 can be applied to persons committing two or more misdemeanors under federal labor laws, which would otherwise carry a maximum of one year imprisonment for each offense. 29 U.S.C. §186.

** The Fourteenth Amendment is applicable to the federal government through the Fifth Amendment. *Bolling* v. *Sharpe,* 347 U.S. 497 (1954).

D.

Due Process Principles, If Not Double Jeopardy Per Se, Require Review Of Petitioners' Multiple Punishment Based On The Same Conduct.

As set out in the introduction to this section (pp. 8-10, *supra*), both petitioners received consecutive sentences for the RICO convictions and counts underlying the RICO charges. Additionally, before his federal trial, Foresta was convicted in an Indiana state court of one of the robberies which formed the basis for the charges in the present case. (See App. 1 at 16-18.) The Seventh Circuit, citing *Abbate* v. *United States,* 359 U.S. 187, 194 (1959), and *Bartkus* v. *Illinois,* 359 U.S. 121 (1959), held that Mr. Foresta's Indiana conviction and sentence did not preclude the federal prosecution. (App. 1 at 17.)

To the extent that the dual sovereignty principles in *Abbate* and *Bartkus* remain the law, state and federal prosecutions based on the same facts are not constitutionally prohibited by the federal protection against double jeopardy. Nonetheless, petitioner Foresta submits that the composite aggregation of the maximum possible federal offenses (allowable under RICO—see App. 1 at 14), when imposed in addition to the Indiana sentence,* constitutes multiple punishment for the same conduct, which due process of law cannot countenance. Cf. *Ashe* v. *Swenson,* 397 U.S. 436, 445 (1970). Moreover, federal participation in petitioner Foresta's earlier Indiana state trial (see App. 1

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* Mr. Foresta was sentenced to eighteen years by the Indiana state court.

at 17) forecloses reliance on "dual sovereignty" to defeat the quadruple punishment claim. Cf. *Elkins* v. *United States,* 364 U.S. 206 (1960); *Rios* v. *United States,* 364 U.S. 253 (1960).

Petitioners request that certiorari be granted so this Court may reconsider whether multiple federal sentencing for the same conduct, following a state sentence for the underlying offense, is permissible under prevailing views of double jeopardy and dual sovereignty and, in any event, whether due process permits what amounts to quadruple punishment for a single course of conduct. This Court should also consider the multiple sentencing question in the context of the proper application of RICO, as set forth in the introduction to Part I, pp. 9-10, above.

II.

THIS COURT SHOULD REVIEW THE REFUSAL TO SEVER COUNTS FOR TRIAL, OR ALTERNATIVELY, TO ELIMINATE EVIDENCE OF PREJUDICIAL SURPLUSAGE FROM THE JURY'S CONSIDERATION.

Both petitioners moved for severance of counts charging Foresta with possessing and transporting a firearm in commerce after having previously been convicted of robbery by assault in violation of 18 U.S.C. §922(g) and 18 U.S.C. §1202(a)(1). The Seventh Circuit stated that, upon the trial court's denial of a severance, "Foresta's prior felony conviction thus became necessarily an element of the government's proof." (App. 1 at 21.) Paying compulsory lip-service to the principle that juries are presumed to follow limiting instructions,* the court rationalized that the trial court had no choice other than to admit the complained-of evidence.

* But see *Bruton* v. *United States,* 391 U.S. 123, 129 (1968).

Nowhere in the opinion does the Court of Appeals acknowledge what should have been the determinative factor: Foresta offered to stipulate to the prior felony conviction* requesting that the jury not be informed that the specific felony was robbery.** This crucial unmentioned fact destroys the rationale employed by the court below. Even if severance was not required, the trial court should have acceded to petitioners' request that the jury not be advised that the nature of the prior felony was—like the underlying offenses in issue—robbery.

A defendant's prior troubles with the law ordinarily are kept from the jury, not because such evidence is not probative of his guilt of the offense charged, but, rather, because such evidence is judicially recognized to weigh too heavily with a jury, rendering it too likely that they will convict him on the basis of his past conduct. See *Michelson* v. *United States,* 335 U.S. 469, 475-76 (1948).

This Court should grant certiorari to set limits on admission of prejudicial evidence where, as in the present case, the irremediable prejudice can be avoided by honoring a defense offer to stipulate.

* Petitioner's offer to stipulate was called to the reviewing court's attention. See defendants' original brief (on file in the Seventh Circuit, No. 78-1782 and 78-1783), p. 61.

** The jury was informed that Foresta had a prior conviction for robbery, but was not informed that it was "by assault."

CONCLUSION

For the foregoing reasons, petitioners respectfully pray that this Court grant a writ of certiorari to review the judgment of the Court of Appeals for the Seventh Circuit in this case.

Respectfully submitted,

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APPENDIX

APPENDIX 1

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 78-1782 and 78-1783

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

HARRY ALEMAN and LEONARD FORESTA,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 77 CR 789 — Stanley J. Roszkowski, *Judge.*

ARGUED FEBRUARY 27, 1979 — DENIED OCTOBER 30, 1979

Before SWYGERT, BAUER, and WOOD, *Circuit Judges.*

WOOD, *Circuit Judge.* The basic issue in this case is the applicability of the Racketeer Influenced and Corrupt Organizations Act (RICO)[1] to criminal activities which do not constitute the infiltration by organized crime of legitimate business. Defendants deny that the Act can be applied to a series of burglaries committed in two states by defendants who are not shown to be members of "organ-

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[1] Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (1976).

ized crime'' but also argue, in the alternative, that if the Act is applicable to these particular circumstances, then it should be declared unconstitutional as being vague, a denial of equal protection and as permitting the imposition of cruel and unusual punishment. The other issues relate to severances, alleged trial errors, and sentencing. We resolve all the issues against defendants.

Defendants Aleman and Foresta were charged in a nine count indictment with two violations of RICO by reason of a pattern of racketeering activity involving the commission of three home robberies in Illinois and Indiana. The additional counts alleged the transportation of stolen goods from an Indiana robbery in interstate commerce, and the transportation and possession of firearms. In a jury trial Aleman was found guilty on one count of conspiracy to violate the Act (18 U.S.C. § 1962(d)) (Count I), one count charging a substantive violation of the Act (18 U.S.C. § 1962(c)) (Count II),[2] and one count of transporting stolen goods in interstate commerce (18 U.S.C. § 2314) (Count III).[3] Aleman was found not guilty on two

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[2] The pertinent RICO statutory sections are as follows:

18 U.S.C. § 1962(c) provides:

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprises's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(d) provides:

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

[3] Aleman was sentenced to imprisonment for two concurrent terms of 20 years and one consecutive 10-year term for a total of 30 years.

firearms counts (Counts V and VII). Foresta was found guilty of the same RICO violations and Count III, and in addition guilty of the particular firearms violations applicable to him (Counts IV, VI, VIII, and IX).[4]

THE FACTS

Some examination of the evidence is necessary. The government's case was based to a large extent on the testimony of Louis Almeida, concededly a professional criminal, who was named in the indictment as an unindicted co-conspirator. His testimony was supplemented by testimony of the home invasion victims. Three robberies were involved.

The first robbery occurred on September 16, 1972, at the home of Mrs. Barbara LaPapa in Oak Lawn, Illinois, following a meeting at the Survivor's Club in Chicago between Aleman, Foresta, Almeida, and two others, not involved in this appeal. It was believed by them that Mrs. LaPapa had a large amount of cash in her home which they planned to steal and divide. Foresta and Almeida were selected to actually perform the robbery. Aleman provided the keys to a stolen car for their use and the address of the target home. At the home Foresta threatened Mrs. LaPapa by pressing the barrel of his gun against her stomach and then with help from Almeida tied her up on the floor. A 14-year old baby sitter for Mrs. LaPapa's infant child was also tied up. After about 30 minutes spent in searching the house and collecting cash and jewelry, Foresta and Almeida left leaving the victims tied. They returned with the loot to the club where the others waited. Aleman paid Foresta and Almeida each $500 for their burglary services.

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[4] Foresta was sentenced to imprisonment for concurrent terms of 20 years and a consecutive term of 10 years for a total of 30 years together with additional concurrent terms of 10 years and 2 years.

The second burglary did not occur until January 1973, although the defendants and Almeida continued to associate with each other. The genesis of this robbery also took place at the club. The target was a doctor's home in Indianapolis where defendants believed a large amount of cash was kept. Foresta and Almeida were again selected to actually undertake the robbery. Aleman supplied the information about the target home along with a sheriff's badge to be used as a ruse to gain entry. Aleman advised that weapons be carried. Proceeding to Indianapolis, Foresta and Almeida first went to the residence of Leo Miroff, a friend of Aleman's, as they had been instructed to do by Aleman. Miroff and his girl friend, Jane Powers, were present. Miroff, assuring Foresta and Almeida about the amount of cash, showed them the doctor's home. Later Foresta and Almeida went to the doctor's home and, using the sheriff's badge, pushed their way in past the maid, the only person present. She was threatened with a gun and then tied up. After about an hour Foresta and Almeida left with jewelry, furs, and cash, of a total value of about $35,000, and with the maid's car which was later abandoned. Rejoining Miroff and Powers, all four drove with the fruits of the robbery to the home of Aleman in Chicago. Again Aleman paid Foresta and Almeida each $500 for their burglary services. Miroff, at Aleman's direction, was to sell the stolen goods piecemeal rather than in bulk. In the meantime Miroff and Powers became house guests of a friend, Robert Harder, in the Chicago area where they stored the Indianapolis loot while attempting to dispose of it. Miroff chose one prospective customer, but it was a bad choice. The customer was an undercover agent of the Federal Bureau of Narcotics and Dangerous Drugs. As a result, most of the loot was recovered in connection with arrests

at the friend's house. Also seized was a small book with names and telephone numbers which is involved in one of the trial issues.

The third robbery followed in November 1973 after additional contacts between the parties at the club and a pre-robbery planning session. This time the target was a north side Chicago home where information led them to believe they would find a large quantity of gold coins. Aleman, Almeida, Foresta, and another man directly participated in this robbery. Again using the sheriff's badge, Foresta and Almeida entered the home and struck the owner in the head with a gun. When he fell, they tied him. His wife was also tied. All four of the robbers searched and ransacked the house for almost an hour and left with about $6,500 worth of various items, but no gold coins.

The defendants did not testify, and relied in their defense primarily on efforts to impeach Almeida and in discrediting eyewitness identifications.

APPLICATION OF RICO

Based on those facts, the indictment charged in part:

> [B]eing persons associated with an enterprise engaged in and the activities of which affected interstate commerce, to wit, a group of individuals associated in fact to plan and commit robberies, to carry away stolen goods and to divide among themselves the stolen goods and all proceeds derived therefrom, unlawfully, wilfully and knowingly did conduct and participate, directly and indirectly in the conduct of such enterprise's affairs through a pattern of racketeering activity, to wit, the commission of robberies in Chicago, Illinois, Oak Lawn, Illinois and Indianapolis, Indiana.

Defendants claim that their alleged criminal conduct does not violate either § 1962(c) or § 1962(d). To support their

view they point out numerous congressional quotations from Reports of the Senate[5] and House[6] suggesting a legislative intention that § 1962 was to apply only to the infiltration by organized crime of legitimate organizations. However, nothing is found in the legislative history, even if we assume that some ambiguity in the Act requires that it be examined, to suggest that the broad wording of the statute is strictly limited to organized crime activities where legitimate business is involved, and may not be used under its broad language to also curb other criminal activities when the acts are part of an illegal enterprise. In addition to the quotations from various Congressmen, defendants cite a law review article written by the late Senator John L. McClellan, one of the sponsors of The Organized Crime Control Act, which encompasses § 1962. "Title IX [§§ 1961-1968]," the Senator wrote, "is aimed at removing organized crime from our legitimate organizations." McClellan, *The Organized Crime Act (S. 30) Or Its Critics: Which Threatens Civil Liberties?*, 46 Notre Dame Law. 55, 141 (1970). But that one sentence is not all the Senator said about the purposes of Title IX. A few pages later the Senator, in answer to criticisms that the statutory list of crimes of which robbery is a part was too inclusive and included offenses often committed by persons not engaged in organized crime, further explained:

> The Senate report does not claim, however, that the listed offenses are committed *primarily* by members of organized crime, only that those offenses are characteristic of organized crime. The listed offenses lend themselves to organized commercial exploitation, unlike some other offenses such as rape, and experience has shown they are commonly committed by participants in organized crime. That is all the title IX list of offenses purports to be, that is all the Senate report claims it to be, and that is all it should be.

Id. at 142-43. (Emphasis by the Senator). Then on the next page the Senator further explains Title IX of the Act:

> It is self-defeating to attempt to exclude from any list of offenses such as that found in title IX all offenses which commonly are committed by persons not involved in organized crime. Title IX's list does all that can be expected, as does the list found in the electronic surveillance provisions of title III of the 1968 Safe Streets Act—it lists offenses committed by organized crime with substantial frequency, as part of its commercial operations. The danger that commission of such offenses by other individuals would subject them to proceedings under title IX is even smaller than any such danger under title III of the 1968 act, since commission of a crime listed under title IX provides only one element of title IX's prohibitions. Unless an individual not only commits such a crime but engages in a pattern of such violations, and uses that pattern to obtain or operate an interest in an interstate business, he is not made subject to proceedings under title IX.

Id. at 144.

The clear implication is that it is realized that the Act is not restricted to members of organized crime, but can be used to reach out for others if the statutory conditions are met.

The prohibitions of 18 U.S.C. § 1962(c) apply to "any person" and "any enterprise." Although the stated purpose of the Organized Crime Act, of which RICO is a part, is to eradicate organized crime, the statute itself does not require proof that the defendant or the enterprise are con-

[5] Senate Committee on the Judiciary, Report on Organized Crime Control Act of 1969, S. Rep. No. 91-617, 91st Cong., 1st Sess. (1969).

[6] H.R. Rep. No. 91-1549, 91st Cong., 2d Sess., *reprinted in* [1970] U.S. Code & Adm. News 4007, 4033.

nected with organized crime. In § 3503(a) of Title VI of the Organized Crime Control Act, Congress demonstrated it knew how to limit a provision to "a person who is believed to have participated in an organized criminal activity" if that was what was intended. 18 U.S.C. § 3503(a). The statute defines "person" merely as including "any individual or entity capable of holding a legal or beneficial interest in property."[7] "Enterprise" is defined as including "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity. . . ."[8] Our interpretation of RICO is not novel. In *United States* v. *Campanale,* 518 F.2d 352, 363 (9th Cir. 1975), *cert. denied,* 423 U.S. 1050 (1976), the court notes that although Congress "focused on some of the kinds of activities by which individuals and associations engaged in organized crime maintained their income or influence," § 1962 "makes unlawful such activities no matter who engages" in them. Although there need be no allegation of organized crime, there is the requirement that a "pattern of racketeering" be alleged and proven. It was. Racketeering activity as defined in the statute includes the state crime of robbery.[9] A pattern may be established by showing only two acts of racketeering activity.[10]

Defendants argue that § 1962 is not applicable to an illegal enterprise, but only to an infiltrated legitimate business. In support of their positions, defendants first cite *Church of the Holy Trinity* v. *United States,* 143 U.S. 457 (1892), for the view that general statutory language directed toward a particular evil should not be read to unexpectedly encompass other evils. However, the Court qualified that statement. The statute, it said, should not be read so broadly so as to reach "acts which the whole history and life of the country affirm could not have been intentionally legislated against." 143 U.S. at 472. Home invasion does not qualify as such an act.

[7] 18 U.S.C. § 1961(3).

[8] 18 U.S.C. § 1961(4).

[9] 18 U.S.C. § 1961(1).

[10] 18 U.S.C. § 1961(5).

But, defendant argues even if Congress may not have intended to limit § 1962 to infiltration of legitimate business, any uncertainty should be resolved in favor of defendants. *Rewis* v. *United States,* 401 U.S. 808 (1971); *United States* v. *Campos-Serrano,* 404 U.S. 293 (1971). In *Rewis* the Court reaffirmed that ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity. In that case, however, along with other considerations the statutory language under consideration was given its ordinary meaning which limited the act's ambit. 401 U.S. at 811. In *Campos-Serrano,* while considering whether possession of a counterfeit alien registration card was an act punishable under 18 U.S.C. § 1546, the Court repeated the long settled general rule that penal statutes are to be strictly construed. 404 U.S. at 297. RICO statutory language, however, was not being interpreted.

We previously touched on this problem in *United States* v. *Cappetto,* 502 F.2d 1351 (7th Cir. 1974), *cert. denied,* 420 U.S. 925 (1975), a civil proceeding under § 1962(b), (c), and (d). We held that in addition to a congressional intention to protect legitimate business against infiltration by racketeers, the statute covered other patterns of racketeering activities in or affecting commerce, in that case a gambling business. 502 F.2d at 1358. Later in *United States* v. *Nerone,* 563 F.2d 836, 850 (7th Cir. 1977), *cert. denied,* 435 U.S. 951 (1978), we recognized our prior holding in *Capetto,* but *Nerone* was a case in which the government

undertook to establish infiltration. Defendant would distinguish those cases on the basis that in each the gambling involved might conceivably be considered as businesses, although illegal, but it is absurd, defendant argues, to consider the activities in the present case as constituting a "home robbery business." However, defendant forthrightly bring to our attention a contrary view expressed in *United States* v. *Elliott,* 571 F.2d 880 (5th Cir. 1978), *cert. denied,* 99 S.Ct. 349 (1978), in which that court held that a group of people who engaged in arson, murder and truck hijackings constituted an "enterprise" under § 1962. That was not a new interpretation of § 1962 by the Fifth Circuit. In *United States* v. *Hawes,* 529 F.2d 472, 479 (5th Cir. 1976), the court held that the term "enterprise" had a very broad meaning and was not restricted to legitimate business enterprises. The D.C., Second, and Ninth Circuits have expressed similar views. *United States* v. *Swiderski,* 593 F.2d 1246 (D.C. Cir. 1978), *cert. denied,* 99 S.Ct. 2055, 2056 (1979); *United States* v. *Altese,* 542 F.2d 104 (2d Cir. 1976), *cert. denied,* 429 U.S. 1039 (1977); *United States* v. *Rone,* 598 F.2d 564 (9th Cir. 1979); *United States* v. *Campanale,* 518 F.2d 352 (9th Cir. 1975), *cert. denied,* 423 U.S. 1050 (1976). Also we have recently held in *United States* v. *Grzywacz,* 603 F.2d 682 (7th Cir. 1979), J. Swygert dissenting, that public entities and individuals, in that case a police department, may be considered enterprises for RICO purposes through which racketeering is conducted. Only the Sixth Circuit has held that RICO was restricted in application to legitimate business enterprises. *United States* v. *Sutton,* Nos. 78-5134, 78-5135, 78-5136, 78-5137, 78-5138, 78-5139, 78-5141, 78-5142, 78-5143 (6th Cir. Sept. 4, 1979). We align ourselves with Judge Engle's view in dissent that RICO is not limited to include only legitimate business. *Sutton,* at page 23.

As the Fifth Circuit explained in *Elliott,* 571 F.2d 880, part of the dispute as to whether RICO includes illegitimate businesses derives from dicta in *Iannelli* v. *United States,* 420 U.S. 770 (1975). *Elliott,* 571 F.2d at 879 n.17. In *Iannelli* in footnote 19 the Supreme Court commented that RICO seeks to prevent infiltration of legitimate business by racketeers, but we see no indication in that comment that was intended as a signal that RICO coverage should be given a more limited interpretation than the statute on its face suggests.

In *Elliott,* 571 F.2d at 898, the court analogized the illegal enterprise there under consideration to a large business conglomerate with a chairman of the board overseeing the operations of separate corporate departments. Perhaps such an impressive organization was the ambition of the defendants in the present case. At the time it was closed down, however, at least so far as the evidence reveals, it could only be regarded as a small business. Aleman was the proprietor. The business office was the Survivor's Club. Their investment in equipment was negligible as the cars they used were stolen. The payroll was limited. Perhaps given more time, their business would have successfully grown into a conglomerate at the expense of their victims, but fortunately for the public the defendants were put out of business.

The defendants also contend that if § 1962(c) is read to include illegitimate business it should be deemed void for vagueness. That the phrase "any enterprise" is broad in scope, does not mean that because it includes both legitimate and illegitimate enterprises instead of only one or the other that it is therefore vague. As we have noted, "enterprise" is broadly defined by the statute to include among other things a "group of individuals associated in

fact although not a legal entity."[11] Being broad in scope is not synonymous with being vague. Our view on this issue is shared by others.[12]

The defendants also argue that RICO violates their rights to equal protection because of the discretion permitted the prosecutor to charge a RICO offense or to select only an underlying crime. Prosecutorial discretion does not itself constitute a violation of equal protection unless it is abused for reasons of race, religion or other arbitrary and improper classification which is not claimed to exist in this case. *United States* v. *Neary,* 552 F.2d 1184, 1195 (7th Cir.), *cert. denied,* 434 U.S. 864 (1977). We would expect, however, that government prosecutorial policy will reserve use of this statute for racketeers, leaving local crimes to local authorities. The vagueness argument of defendants is broader than possible abuse of prosecutorial discretion. The statute is vague, defendants claim, because it is impossible to tell which offenses may fall within the ambit of §1962. Because would-be racketeers may have some alleged difficulty in determining in advance whether their contemplated activities may violate the statute does not mean that the courts must adopt their interpretation of the statute. The statute is clear enough on its face to serve the purposes of both the public and the racketeer. The defendants also argue that unless restricted only to organized crime the statute denies equal protection. We

[11] 18 U.S.C. § 1961(4).

[12] *United States* v. *Hawes,* 529 F.2d 472, 479 (5th Cir. 1976); *United States* v. *Campanale,* 518 F.2d 352, 364 (9th Cir. 1975), *cert. denied,* 423 U.S. 1050 (1976); *United States* v. *Cappetto,* 502 F.2d 1351, 1357-58 (7th Cir. 1974), *cert. denied,* 420 U.S. 925 (1975); *United States* v. *Parness,* 503 F.2d 430, 441-42 (2d Cir. 1974), *cert. denied,* 419 U.S. 1105 (1975).

see no denial of equal protection to racketeers who strive to emulate the achievements of their brothers in organized crime.

Finally, defendants claim RICO is repugnant to the Eighth Amendment's ban against cruel and unusual punishment because, as the government views the statute, it may be applied to other than members of organized crime. We find no merit in that contention. Although a RICO offender may be sentenced to a maximum of 20 years the sentence is not mandatory. A § 1962 offender may be sentenced to less than 20 years, fined or given probation. If a defendant qualifies as a racketeer able to accomplish the same illegal goals as organized crime he qualifies for the punishment. The court's sentencing discretion applicable to all offenders alike does not run afoul of the Constitution.

OTHER ISSUES

The defendants argue that the indictment is multiplicitous, charging defendants with the same offense in various counts, because of the interrelationship between Counts I and II and Count III. Count I charged a RICO conspiracy incorporating by reference Count III as one of several overt acts. Count II alleged a substantive RICO offense and likewise incorporated Count III as an additional racketeering act. Count III charged the defendants with the substantive crime of interstate transportation of stolen property. The sentences for each defendant on Count III were made consecutive to the sentences on Counts I and II. In addition, Foresta was convicted by a state court of the same Indiana robbery. Defendants rely primarily on *Prince* v. *United States,* 352 U.S. 322 (1957), in which the Court held that the entry into a bank with intent to rob was not intended as a separate offense under 18 U.S.C. § 2113 from the consummated robbery and therefore the intended crime merged into the completed crime.

We are considering a different statutory scheme. Congress made its intent clear that RICO did not supersede any other law, federal or state, imposing penalties in addition to those provided by RICO.[13] Congress stated its intent was to provide enhanced sanctions.[14] RICO § 1961(5) illustrates this congressional intent. It requires that to constitute an offense that two predicate acts must occur within 10 years, but from that 10 year period is excluded "any period of imprisonment." It is implicit in that provision that even though a defendant has already served time for the first predicate offense that first offense may still be used as an element in establishing a RICO "pattern."

We see no multiplicity, as each count, although related, required in part different proof. Merely incorporating by reference a substantive count into a conspiracy count does not constitute multiplicity. *United States* v. *Bartemio*, 547 F.2d 341, 345 (7th Cir. 1974). The Count I conspiracy is obviously distinct from the Count III charge of interstate transportation of the fruits of the burglary. Count II requiring proof of the conduct of the enterprise's affairs through a pattern of racketeering activity is in contrast to the proof required to sustain Count III, and lacks the necessity of proof of conspiracy.

Defendants also claim that there were three prejudicial trial errors. First, defendants complain about a question asked on cross-examination of George Marcantonio, a defense witness called by Aleman. Marcantonio testified he would not believe Almeida, the government's witness, under oath. Marcantonio claimed to have only the slightest of

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[13] Sec. 904(b) of Pub. L. 91-452, 84 Stat. 947 (1970).

[14] 84 Stat. 923 (1970).

social relationship with Aleman. The government then asked, "Isn't it correct, Mr. Marcantonio, that you are afraid of Mr. Aleman?" There was a defense objection and a side bar conference at which Aleman's counsel moved for a mistrial which was denied. The trial judge carefully explored the circumstances surrounding the government's question. Government counsel explained that the basis for the question was available government evidence that Marcantonio had been involved in the robbery of an armored truck with Aleman who had viciously beaten up Marcantonio thus causing Marcantonio to fear Aleman. It was explained that Almeida was also the primary witness about that episode and that the government possessed Almeida's written statement. Certain law enforcement officers, the government claimed could supply circumstantial evidence about the affair. Government counsel further explained that not knowing Marcantonio would be called as a witness, he was not prepared at that moment during the side bar conference to say whether or not the government would pursue the matter and offer the evidence to show Marcantonio's bias. Marcantonio, outside the presence of the jury, denied the government's allegations about his relationship with Aleman. The matter was not pursued further before the jury. The record does not reveal that Marcantonio answered the question before the jury although some counsel believe he did. If he did respond, it appears the answer would have been that he was not afraid of Aleman. Defense counsel failed to follow up their original objection before the jury as they sought no ruling upon it. Nor was there any defense request to strike the question and answer, if there was an answer, or to instruct the jury to disregard it. At the close of all the evidence the defendants did not renew any objection or again move for mistrial after the government had failed to offer evidence in rebuttal regarding Marcantonio's relationship with Aleman.

That the possible bias of a witness which may affect credibility is a proper and critical area of exploration by cross-examination is beyond question. Defendants now argue that the error was that the government did not follow the question up with evidence to demonstrate a basis for the question. However, the record suggests that during trial, defense counsel did not want any rebuttal government evidence offered on that issue and had previously sought exclusion of all evidence about fear of Aleman. The government's rebuttal evidence cannot be perceived as being beneficial to Aleman's case. Although at side bar government counsel cautiously mentioned the possibility always existing that the witness when actually called might testify to a different version than recorded in his prior statement, the good faith of the government was not seriously questioned at trial. Defense counsel helped avoid that possible rebuttal evidence damaging to him during trial, but now seeks to have it the other way.

In the circumstances of this case, we see no reversible error in the incomplete impeachment. The question was not pursued by the government. The defendants failed to seek available remedies from the trial court to strike the question or give the jury a cautioning instruction. This case is in sharp contrast to those cases in which a question without any factual basis had been used before a jury merely because of the prejudicial suggestion emanating from the question itself. *United States* v. *Harris,* 542 F.2d 1283, 1308 (7th Cir. 1976), *cert. denied,* 430 U.S. 934 (1977). In any event this one unanswered question about fear of the defendant put to a witness in an attempt to impeach a government witness could only be lost in many days of trial in which substantial evidence of guns, threats, personal abuse, and home robberies abounded. The possible fear of the witness was not again suggested in any way to the

jury. We cannot agree with defendants that the case against Aleman was weak and that therefore the question assumed some unusual critical significance. Sufficiency of the evidence was not an issue on appeal.

It is next claimed that it was error to admit into evidence the small book of names and telephone numbers seized by officers at Harder's house in the room occupied by Miroff and Powers as house guests. Inventory lists of the stolen Indianapolis property, partly in the handwriting of Miroff and partly in the handwriting of Powers, were found along with this book. The Indianapolis stolen property was also part of their luggage. Defendants first argue that the foundation laid to permit the book's admission into evidence was inadequate. We believe the book's connections with Miroff were sufficient. A handwriting expert testified that part of the book, though not the relevant part, was in the handwriting of Miroff. On one page of the book three telephone numbers were found next to the name "Harry," circumstantially Aleman. Independent evidence established that two of the numbers were those of a restaurant and a club which Aleman frequented. Telephone company records which went back to 1976 revealed that the third number had been registered to a Ruth Aleman on Concord in Melrose Park. There was testimony that defendant Aleman lived on Concord in Melrose Park in 1972 and 1973. The book tended to corroborate the enterprise relationship between Aleman and Miroff testified to by Almeida. This establishes an adequate foundation to find the evidence relevant. Fed. R. Evid. 401, 402. Any weakness in that regard was a matter of weight not relevancy.

Defendants further contend that the book should not be admitted to corroborate this enterprise relationship because the book is hearsay when used to establish this rela-

tionship. We disagree. The relevant listing in the book asserted that "Harry" could be reached at one of three numbers. The listing had value without regard to the veracity of that assertion. The listing was not offered for its truth, but to show Miroff's acquaintance with Aleman. Independent evidence connected Miroff with Aleman based on the book. The book was not relied on to show "Harry's" phone number, only to indicate that Miroff had knowledge of someone named "Harry" at the relevant time. The additional evidence eliminated the hearsay dangers. The book was properly admitted. *McCormick on Evidence* ¶249, at 592 (2d ed. 1976); Note, 44 Mich. L. Rev. 480, 481 (1945).

Aleman also questions the admission into evidence of the testimony of an investigator for the Chicago Police Department that on a particular occasion he kept Aleman under observation. The officer testified that, about two weeks after the Indianapolis robbery, while having lunch, he saw Harder and his house guests, Miroff and Powers, together in a restaurant. A few minutes later he saw Harder leave that restaurant with Aleman and go to another restaurant where they remained for about an hour. When the officer was asked what he did on that occasion, he replied that he "kept Aleman under observation," and followed him west on a particular street. No objection was made to the question. Defendants claim that the answer engendered prejudicial error because it suggested Aleman was someone the police had reason to surveil. The question and answer cannot constitute plain error. The testimony only completed what the officer had observed on one occasion between the principals. Even had a defense objection been timely made at trial instead of on appeal, there would have been no error in overruling it.

Separate issues are raised as to Foresta by the claim that he was sentenced four times for the same offense.

He received a state sentence for the Indianapolis robbery. That same robbery was also a factor in Count I, the conspiracy; Count II, the substantive racketeering violation; and also in Count III, the transportation of the stolen Indiana property. The trial court made no comment about whether the federal sentence would be concurrent or consecutive with the state sentence. Foresta argues that the government should be estopped from bringing the prosecution, or that in the alternative the case should be remanded for resentencing with credit to be allowed for the state sentence. He also complains that federal authorities cooperated with the Indiana prosecutors. We do not see that the Indiana conviction precludes the federal prosecution. There is no double jeopardy. Not only are different sovereignties involved, but the crimes are separate and distinct. The Indianapolis robbery constituted only one of numerous overt acts in the conspiracy charge and one of four racketeering acts alleged in Count II. Count III was not a prosecution for the Indianapolis robbery, but for transporting the loot from that robbery in interstate commerce.

The dual sovereignty doctrine of *Abbate* v. *United States,* 359 U.S. 187, 194 (1959), and *Bartkus* v. *Illinois,* 359 U.S. 121 (1959), remains the law; state and federal prosecutions based on the same facts are not constitutionally prohibited. *United States* v. *Wheeler,* 435 U.S. 313, 316-22 (1978). The doctrine simply means that the same single act of a defendant may constitute more than one offense as he may have violated both federal and state laws for which he may be prosecuted. The dual sovereignty doctrine is subject to the qualification, however, that a state prosecution cannot be used merely as a cover and a tool of federal authorities. *Bartkus*, 359 U.S. at 123-24. That an FBI Special Agent testified at Foresta's Indiana trial and a federal prosecutor was listed as a possible state witness

does not alone turn the state trial into a sham. Law enforcement cooperation between state and federal authorities is a welcome innovation. Instead of cooperation Foresta views it as federal "orchestration" of state authorities to produce a robbery conviction upon which to develop a RICO indictment. We do not find federal "orchestration" in the record. Indiana authorities were merely performing their own public duty in prosecuting Foresta for burglarizing the home of a local doctor. State authorities need not defer the performance of their own local obligations because of the possibility that the federal authorities might in the future pursue the interstate aspects of the crime.

Nor is there any need to return Foresta for resentencing. Under 18 U.S.C. § 3568, a federal sentence commences to run when the defendant is received at a place of confinement for service of the sentence. Under that section the computation of sentence credits is computed by the Attorney General, not the sentencing judge. The sentencing judge has no power to make a federal sentence concurrent with a prior state sentence. Under 18 U.S.C. § 4082, it is the Attorney General who designates the place of confinement. The sentencing judge may only recommend that the Attorney General designate a state institution as a place for service of the federal sentence. If the recommendation is followed, then the state and federal sentences in effect become concurrent. *United States* v. *Allen,* 588 F.2d 183, 185 (5th Cir. 1979). Such a recommendation is entirely discretionary with the sentencing judge. That there is a factual relationship between the state and federal cases does not require that the trial judge's discretion be exercised in any particular way. No recommendation was made in this case.

Aleman and Foresta also raise a severance issue. Prior to trial Aleman and Foresta[15] sought severance of Counts VIII and IX which charged Foresta with possessing and transporting a firearm in commerce after having been previously convicted of robbery by assault, a felony, in violation of 18 U.S.C. § 922(g)[16] and 18 U.S.C. app. § 1202(a)(1)[17]. The motion was denied. Foresta's prior felony conviction thus became necessarily an element of the government's proof. Defendants claim the introduction of the admission of evidence of that conviction constituted error, relying on *United States* v. *Phillips,* 401 F.2d 301 (7th Cir. 1968), and *United States* v. *Ostrowsky,* 501 F.2d 318 (7th Cir. 1974). In those cases, in which evidence of prior crime was admitted for other purposes, it was a matter of the

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[15] The government raises some question about the manner in which Foresta moved for severance as at trial he joined in Aleman's motion which was not tailored to his own claims as they appear on appeal, but we need not consider those circumstances.

[16] The pertinent part of 18 U.S.C. § 922(g) provides as follows:

(g) It shall be unlawful for any person—

(1) . . . who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year;

* * *

to ship or transport any fierarm or ammunition in interstate or foreign commerce.

[17] The pertinent part of 18 U.S.C. app. § 1202(a) provides as follows:

(a) Any person who—

(1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony . . .

* * *

. . . who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

trial judges' discretion to admit the evidence or to limit its scope. In the present case the prior conviction is an element of the crime. Its admission was not a matter of the trial court's discretion. No details about Foresta's prior robbery by assault were explored. Also, no reference was made during trial before the jury that Foresta's prior conviction of robbery was in fact "robbery by assault." The jury was instructed to give separate consideration to each defendant and to each count. The jury obviously did this as Aleman was acquitted on two firearms charges. The criminal record involved was not Aleman's and he was not shown to have been involved in any way in Foresta's other robbery. The jury was further charged that Foresta's prior conviction should not in any way be considered as proof of the fact that he had committed any of the offenses charged in this indictment. Defendants doubt the efficacy of those limiting instructions. Under our jury system, however, it is fundamental that we reasonably trust juries to make factual determinations in accordance with the court's instructions. *United States* v. *Pacente,* 503 F.2d 543, 548 (7th Cir.) (en banc), *cert. denied,* 419 U.S. 1048 (1974). The circumstances of this case do not suggest that the jury disregarded the court's instructions.

Severance could have avoided that issue, but we find no clear abuse of the trial court's discretion in denying the motion under Rule 14 of the Federal Rules of Criminal Procedure. *United States* v. *Papia,* 560 F.2d 827, 840 (7th Cir. 1977). Foresta's gun as alleged in Counts VIII and IX was also involved in both Counts I and II. Its transportation was alleged as an overt act in the conspiracy, Count I, and it was evidence of an act of racketeering activity in Count II. There was no necessity in this case to go back over much of the same gun evidence in separate trials. There has been no "strong showing of prejudice" as to either defendant. *United States* v. *Kepal,* 552 F.2d 1265, 1272 (7th Cir.), *cert. denied,* 434 U.S. 970 (1977). Other

reviewing courts lend support to our view that severance is unnecessary in somewhat similar circumstances. *United States* v. *Roe,* 495 F.2d 600, 604 (10th Cir.), *cert. denied,* 419 U.S. 858 (1974); *United States* v. *Lee,* 428 F.2d 917, 920 (6th Cir. 1970), *cert. denied,* 404 U.S. 1017 (1972); *United States* v. *Abshire,* 471 F.2d 116, 118-19 (5th Cir. 1972).

The final issue concerns Aleman's contention that his sentence, a total of 30 years on all counts, was excessive. He claims the record contains no explanation for the sentence imposed. None is required, but some explanation does appear. The reasons for the sentence are apparent and fully justify the exercise of the court's sentencing discretion. We will not interfere. *United States* v. *Hansen,* 583 F.2d 325, 334 (7th Cir.), *cert. denied,* 99 S.Ct. 283 (1978). The trial judge said he considered home invasions to be a most serious offense. Aleman was shown to be the head of this interstate enterprise of armed home robbery in which victims were threatened and abused. Aleman also had one prior conviction for which he had received probation. To compare sentences in other cases is ordinarily fruitless and it is in this case. Lesser sentences imposed on others in certain other prior cases apparently were inadequate to serve as deterrents to Aleman and Foresta. Nor does Aleman profit by comparing his sentence with the sentence Foresta received. Although Foresta had a serious prior conviction and was convicted on several additional counts, Aleman was the obvious proprietor of their enterprise, now no longer in business.[18]

AFFIRMED.

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[18] In its brief the government brings to our attention that it filed Petition for Dangerous Special Offender Sentencing pursuant to 18 U.S.C. § 3575 and offered to prove that Aleman had participated in five murders in recent years. The petition was denied, and not made part of the record. Those allegations are totally unsupported in the record before us and are therefore totally ignored.

SWYGERT, *Circuit Judge,* dissenting. In *United States* v. *Grzywacz,* 603 F.2d 682, 690 (7th Cir. 1979), I set forth my basic view on the issue of the extension of the term "enterprise" as used in the Racketeer Influenced and Corrupt Organizations Act (RICO) beyond commercial entities. The same question is before us here and, thus, I see no reason to repeat that view. Additional comment is necessary, however, because the cases involve "enterprises" that are different in nature.

In *Grzywacz* this court was concerned with a city police department, concededly a legitimate entity, albeit not a commercial or business type of organization. Here we are confronted with a so-called "pattern" of criminal activity —the robbing of homes. To urge, as the Government did in *Grzywacz,* that a police department is an "enterprise" within the meaning of the statute, although farfetched and impermissible by any reasonable interpretation of the statute, has some semblance of logic to it. Here, to maintain, as the majority does, that the pattern of criminal activity engaged in by Aleman and his associates is an "enterprise" within the meaning of the statute is to turn logic on its head.

In order to reach the majority's conclusion that such an enterprise exists, we are required to assume that the defendants were infiltrating their own unlawful enterprise through a "pattern of racketeering activity." To my way of thinking, this assumption is absurd. To infiltrate an enterprise, that is, "to conduct or participate . . . in the conduct of such enterprise's affairs [section 1962(c)]," the enterprise must preexist before it is infiltrated by racketeering. Under the facts and the majority's reasoning based on those facts, the enterprise and the racketeering are one and the same. The racketeering defines the enterprise and the enterprise comprises the racketeering.

The majority's faulty reasoning is illustrated by its statement that, "the Act is not restricted to members of organized crime." This misses the point. The point is: What meaning did Congress intend to give the term "enterprise"? Following the above quoted sentence, the majority then says: "Although the stated purpose of the Organized Crime Act, of which RICO is a part, is to eradicate organized crime, the statute itself does not require proof that the defendant or the enterprise are connected with organized crime." Not only is this statement a non sequitur, but it again misses the point on which the case turns. Even taken as true, it does not relate to the question before us.

I believe that the recent Sixth Circuit opinion in *United States* v. *Sutton,* No. 78-5134 (6th Cir. Sept. 4, 1979), correctly decides this very issue. The facts are analogous, and the Government's contentions are the same. Judge Merritt has offered, with admirable clarity, an analysis that is irrefutable.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX 2

Opinion by Judge Wood
Judge Swygert dissenting

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago, Illinois 60604
October 30, 1979

Before
Hon. Luther M. Swygert, Circuit Judge
Hon. William J. Bauer, Circuit Judge
Hon. Harlington Wood, Jr., Circuit Judge

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

Nos. 78-1782 & 78-1783 vs.

HARRY ALEMAN and LEONARD FORESTA,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 77-Cr-689

Stanley Roszkowski, Judge

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the order of this court entered this date.

APPENDIX 3

SUPREME COURT OF THE UNITED STATES

No. A-427

HARRY ALEMAN, ET AL.,

Petitioners,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including December 28, 1979.

/s/ John Paul Stevens
Associate Justice of the Supreme
Court of the United States

Dated this 21
day of November, 1979.

Supreme Court, U. S.
FILED
FEB 27 1980
MICHAEL RODAK, JR., CLERK

No. 79-1009

In the Supreme Court of the United States

OCTOBER TERM, 1979

HARRY ALEMAN and LEONARD FORESTA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-25) is reported at 609 F.2d 298.

JURISDICTION

The judgment of the court of appeals was entered on October 30, 1979. On November 21, 1979, Mr. Justice Stevens extended the time for filing a petition for a writ of certiorari to and including December 28, 1979 (Pet. App. 27), and the petition was filed on

that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 1962(c), which prohibits participation in "any enterprise" that is in or affects interstate commerce and is conducted through a pattern of racketeering activity, extends to participation in illicit ventures as well as participation in legitimate businesses.

2. Whether separate sentences can be imposed for participation and conspiracy to participate in a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c) and (d), and for the underlying illegal acts of racketeering activity.

3. Whether the district court erred in refusing to sever two counts charging petitioner Foresta with transporting and possessing a firearm as a convicted felon, in violation of 18 U.S.C. 922(g) and 18 U.S.C. App. 1202(a)(1), or in allowing the government to introduce evidence of Foresta's prior conviction, despite his proffered stipulation.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioners were convicted of participating in the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c), conspiracy to commit that offense, in violation of 18 U.S.C. 1962(d), and interstate transportation of stolen property, in

violation of 18 U.S.C. 2314. Petitioner Foresta was also convicted of transporting a firearm in interstate commerce to commit a felony, in violation of 18 U.S.C. 924(b), carrying a firearm during the commission of a felony, in violation of 18 U.S.C. 924(c)(2), transporting a firearm in interstate commerce as a convicted felon, in violation of 18 U.S.C. 922(g), and possessing a firearm in interstate commerce as a convicted felon, in violation of 18 U.S.C. App. 1202(a)(1).[1] Petitioners were each sentenced to concurrent terms of 20 years' imprisonment on the racketeering counts, and to a consecutive term of 10 years' imprisonment on the stolen property count. Petitioner Foresta was also sentenced to two 10-year terms and two two-year terms on the firearm counts; these sentences were concurrent with one another and with the sentences on the other counts. The court of appeals affirmed, one judge dissenting (Pet. App. 1-25).

With respect to the racketeering counts, the indictment charged that petitioners had been part of an enterprise of "a group of individuals associated in fact to plan and commit robberies, to carry away stolen goods and to divide among themselves the stolen goods and all proceeds derived therefrom," and that this enterprise had been conducted through "a pattern of racketeering activity * * * [involving] the commission of robberies in Chicago, Illinois, Oak Lawn, Illinois, and Indianapolis, Indiana" (Pet. App. 5). The evidence presented at trial, the sufficiency of which is not disputed, showed that in 1972 and

---

[1] Petitioner Aleman was acquitted on two firearm counts.

1973 petitioners and others committed a series of robberies of homes located in Illinois and Indiana.[2] The robbers operated from a private club in Chicago known as the Survivor's Club and selected homes they believed contained large amounts of cash or other valuable property (Pet. App. 3-5).

The first robbery occurred on September 16, 1972, at a home selected by petitioner Aleman in Oak Lawn, Illinois. Petitioner Foresta and unindicted co-conspirator Almeida carried out the crime after Aleman gave them the keys to a stolen car and the address of the target home. Foresta and Aleman threatened the owner and babysitter who was also present. After searching the house for about 30 minutes and collecting cash and jewelry, the two robbers returned to the Survivor's Club. Aleman paid Foresta and Almeida $500 each for their participation in the robbery (Pet. App. 3).

The second robbery occurred in January 1973 at a doctor's home in Indianapolis, Indiana. Aleman provided Foresta and Almeida with a sheriff's badge to be used as a ruse to gain entry. He also advised them to carry weapons. Foresta and Almeida went to Indianapolis, stopping as planned at the residence of a friend of Aleman's who took them to the target home. Using the sheriff's badge, Foresta and Almeida pushed their way in past the maid, who was then threatened with a gun and tied up. After about an

[2] One of these other participants, unindicted co-conspirator Louis Almeida, testified for the government at petitioners' trial (Pet. App. 3).

hour, Foresta and Almeida left with approximately $35,000 worth of jewelry, furs, and cash, and returned with those items to Aleman's house in Chicago. Aleman again paid Foresta and Almeida $500 each (Pet. App. 4).

The third robbery occurred in November 1973, when Aleman, Foresta, Almeida, and another man, again using the ruse of the sheriff's badge, gained entry to a home in Chicago, Illinois. They struck the owner in the head with a gun and bound him and his wife. The robbers then ransacked the house for nearly an hour and left with property valued at about $6,500 (Pet. App. 5).

ARGUMENT

1. Petitioners contend (Pet. 10-20) that their criminal partnership is not an "enterprise" as the term is defined in 18 U.S.C. 1961(4) and employed in 18 U.S.C. 1962-1964. In support of this contention, they rely upon *United States* v. *Sutton*, 605 F.2d 260 (6th Cir. 1979), in which it was held that the term "enterprise" includes only legitimate ventures and not associations or organizations established solely for unlawful purposes. The Sixth Circuit, however, has granted the government's petition for rehearing en banc in *Sutton* and vacated the panel's opinion.[3] Since all other courts of appeals to consider the issue have agreed with the court below that the statute encompasses illegal enterprises, there is presently no conflict

[3] The Sixth Circuit's order is reprinted in the Appendix, *infra*.

requiring resolution by the Court.[4] Moreover, for the reasons stated in our Brief in Opposition in *Little* v. *United States*, No. 79-5013 (filed Aug. 23, 1979),[5] we submit that Section 1962 reaches not only legitimate businesses or operations, but also informal associations of individuals engaged in illegal activities. Accordingly, the court of appeals properly affirmed petitioners' racketeering convictions (Pet. App. 5-13).[6]

2. Petitioners claim (Pet. 21-22) that their separate sentences for the Section 1962 offenses and for

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[4] In addition to the Seventh Circuit in the instant case, the Second, Third, Fifth, Ninth, and District of Columbia Circuits have taken the opposite view from that of the panel in *Sutton*. See *United States* v. *Altese*, 542 F.2d 104 (2d Cir. 1976), cert. denied, 429 U.S. 1039 (1977); *Manchester* v. *United States*, 605 F.2d 1198 (3d Cir. 1979) (table), petition for cert. pending, No. 79-656; *United States* v. *Elliott*, 571 F.2d 880, 896-899 (5th Cir.), cert. denied, 439 U.S. 953 (1978); *United States* v. *Rone*, 598 F.2d 564, 568-569 (9th Cir. 1979), petition for cert. pending *sub nom. Little* v. *United States*, No. 79-5013; *United States* v. *Swiderski*, 593 F.2d 1246 (D.C. Cir. 1978), cert. denied, 441 U.S. 933 (1979).

[5] We are sending petitioners' counsel a copy of our submissions in *Little*.

[6] Petitioners assert (Pet. 18-21) that the statute as construed by the court of appeals would be unconstitutional. This assertion is insubstantial. The statute gives adequate warning of its prohibitions to allow individuals to conform their conduct to the requirements of the law; as the court of appeals observed (Pet. App. 12), "[b]eing broad in scope is not synonymous with being vague." Nor is the statute invalid because it leaves to the discretion of the prosecutor the selection of an appropriate charge in each case. See, *e.g.*, *United States* v. *Batchelder*, No. 78-776 (June 4, 1979), slip op. 8-11.

the underlying illegal acts of racketeering violated the Due Process and Double Jeopardy Clauses. This claim is without merit.

a. Petitioners first contend that imposition of consecutive sentences on the counts of racketeering and of transportation of stolen property violated the Double Jeopardy Clause because the latter offense was incorporated in the indictment as an act of racketeering activity. This contention is similar to the issue presented in *Whalen* v. *United States*, No. 78-5471 (argued Nov. 27 and 28, 1979): whether the Double Jeopardy Clause prohibits the imposition of cumulative sentences for offenses with different statutory elements, where one of the offenses has as an element the commission of any of a class of other offenses. In *Whalen*, the defendant was convicted of felony murder (which required proof of the commission of one of several enumerated felonies) and of the underlying felony of rape. Here, petitioners were convicted of racketeering offenses (which required proof of two or more acts of racketeering activity) and of the stolen property offense that constituted one of the underlying acts of racketeering. For the reasons set out in the government's Brief in *Whalen*,[7] we submit that the Double Jeopardy Clause does not bar petitioners' consecutive sentences for racketeering and interstate transportation of stolen property.[8]

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[7] A copy of the government's Brief in *Whalen* is being sent to petitioners' counsel.

[8] We note that the court of appeals correctly held (Pet. App. 14) that Congress intended cumulative sentences to be

In any event, the enterprise involved in the racketeering convictions requires proof of only two acts of racketeering activity (18 U.S.C. 1961(5)). Since the evidence at trial showed three acts of racketeering (the three robberies), the stolen property count did not have to be proved in order to establish the existence of an enterprise; hence, the stolen property count was not a "lesser included offense" of the racketeering charge, and thus the consecutive sentences would not violate the Double Jeopardy Clause regardless of the outcome in *Whalen*. Accordingly, this case need not be held pending disposition of *Whalen*.

b. Prior to this prosecution, petitioner Foresta was convicted and sentenced in state court for the Indianapolis robbery, which was one of the acts of racketeering alleged in the counts under Sections 1962(c) and (d).[9] In addition, the items taken during that crime constituted the stolen property involved in the Section 2314 offense. Based on these facts, Foresta contends (Pet. 21) that he was improperly sentenced four times for a single offense.[10] As the court of appeals held (Pet. App. 19), however, this contention is baseless since "different sovereignties [are] involved."[11] See *United States* v. *Wheeler*, 435 U.S. 313 (1978); *Bartkus* v. *Illinois*, 359 U.S. 121 (1959); *Abbate* v. *United States*, 359 U.S. 187 (1959).[12]

3. Petitioners contend (Pet. 22-23) that the district court erred in refusing to sever the two counts charging petitioner Foresta with transporting and possessing a firearm as a convicted felon, in violation of 18 U.S.C. 922(g) and 18 U.S.C. App. 1202(a)(1).[13]

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available for the racketeering offense and the offenses that compose the underlying acts of racketeering activity.

[9] Foresta's state sentence was 18 years' imprisonment (Pet. 21 n.*). Advance authorization for this federal prosecution was obtained from the Assistant Attorney General for the Criminal Division under the Department of Justice's *Petite* policy.

[10] Foresta contends that his multiple sentences violated both due process and double jeopardy principles. The constitutional protections against multiple convictions and sentences for the same conduct, however, are embodied in the Double Jeopardy Clause. See *North Carolina* v. *Pearce*, 395 U.S. 711, 717 (1969). Cf. *Ashe* v. *Swenson*, 397 U.S. 436, 442, 445 (1970); *Abbate* v. *United States*, 359 U.S. 187, 189-190 (1959); *Bartkus* v. *Illinois*, 359 U.S. 121, 127 (1959).

[11] Foresta's claim (Pet. 21-22) that the dual sovereignty doctrine is inapplicable in this case because of "federal participation" in his state trial is meritless. Although it was recognized in *Bartkus* v. *Illinois*, *supra*, 359 U.S. at 123-124, that the dual sovereignty doctrine would not justify successive state and federal prosecutions where the state prosecution was merely a "sham" or "a tool of the federal authorities," no such situation occurred here. As the court of appeals observed (Pet. App. 19-20), "[t]hat an FBI Special Agent testified at Foresta's Indiana trial and a federal prosecutor was listed as a possible state witness [did] not alone turn the state trial into a sham." Cf. *United States* v. *Martin*, 574 F.2d 1359, 1360 (5th Cir. 1978).

[12] In light of the dual sovereignty doctrine, it is unnecessary to consider whether petitioner Foresta's sentences were imposed for the same offenses. However, as the court of appeals held (Pet. App. 19), and as discussed more fully in our Brief in *Whalen*, *supra*, we submit that the federal and state offenses were separate and distinct under the test of *Blockburger* v. *United States*, 284 U.S. 299 (1932).

[13] Petitioners do not dispute that joinder of the counts in question was appropriate under Fed. R. Crim. P. 8(b), since

Alternatively, they contend that the district court should have permitted Foresta to stipulate to his prior conviction rather than allowing the government to introduce evidence of that conviction. These contentions are unavailing.

The proper disposition of a request for a severance is within the discretion of the district court, and the denial of a severance will be reversed only for an abuse of that discretion. See, *e.g.*, *Opper* v. *United States*, 348 U.S. 84, 95 (1954); Notes of the Advisory Committee on Fed. R. Crim. P. 14. As Professor Wright has summarized (C. Wright, *Federal Practice and Procedure: Criminal* § 227, at 468-469 (1969) (footnotes omitted)):

> If the claim is, however, that a joinder, permissible under Rule 8, is nevertheless prejudicial, and that relief should be granted under Rule 14, the matter is addressed to the discretion of the trial court and a conviction will be reversed only if the refusal of the trial court to grant relief was a clear abuse of discretion. * * * The burden is on the defendant to make an affirmative demonstration that his rights to a fair trial have been prejudiced by the joinder, and refusal to grant a severance will be affirmed even if the circumstances are such that a grant of severance would have been sustainable.

The district court did not abuse its discretion in denying a severance in this case. The gun at issue in the firearm counts was also evidence of an act of

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these charges were based on acts related to the racketeering activities alleged in the racketeering counts.

racketeering activity charged in the substantive racketeering offense, and transportation of that gun was one of the overt acts alleged in the racketeering conspiracy. There was no abuse of discretion in deciding to try the offenses together rather than duplicating much of this proof in two separate trials (Pet. App. 22).

Nor have petitioners demonstrated any prejudice from the denial of a severance. Indeed, the possibility of prejudice was minimal in this case. No details of Foresta's prior robbery conviction were elicited, nor was it disclosed that the conviction was for robbery by assault (Pet. App. 22). The jury was instructed that Foresta's prior conviction should not in any way be considered as evidence of his guilt on the present charges and that it should give separate consideration to the evidence against each defendant and to each count (*ibid.*).[14] And, as the court of appeals noted (*ibid.*), "[t]he circumstances of this case do not suggest that the jury disregarded the court's instructions." See *Lakeside* v. *Oregon*, 435 U.S. 333 (1978); *Opper* v. *United States*, *supra*, 348 U.S. at 94-95. Accordingly, there is no basis for concluding that the district court abused its discretion in denying a severance. See *United States* v. *Roe*, 495 F.2d 600, (10th Cir. 1974); *United States* v. *Abshire*, 471 F.2d 116, 118-119 (5th Cir. 1972).[15]

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[14] Petitioner Aleman was in fact acquitted on two firearm charges (Pet. App. 2-3, 22).

[15] *United States* v. *Busic*, 587 F.2d 577, 585 (3d Cir. 1978), cert. granted on other issues, Nos. 78-6020, 78-6029 (June 4,

Finally, petitioners claim that the district court erred in not allowing Foresta to stipulate to his prior conviction. Since this argument was not raised in the court of appeals, it should not be considered here. *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977). Moreover, this Court has recently declined to review this issue in *Stevens* v. *United States*, cert. denied, 439 U.S. 846 (1978), and *Blackburn* v. *United States*, cert. denied, 441 U.S. 948 (1979), and there is no reason for a different disposition here.

In any event, petitioners' claim is without merit. Foresta was convicted of transporting and possessing a firearm in commerce as a convicted felon, in violation of 18 U.S.C. 922(g) and 18 U.S.C. App. 1202(a)(1). A prior felony conviction is therefore an essential element of the crimes charged. As a general rule, the government is not required to accept an offer to stipulate and is allowed to insist upon presenting proof as to all essential elements of the crime charged. See, *e.g.*, *United States* v. *Brinklow*, 560 F.2d 1003, 1006 (10th Cir. 1977), cert. denied, 434 U.S. 1047 (1978); *United States* v. *Kalama*, 549

1979), does not require a contrary result. *Busic* held that a defendant's pretrial motion to sever a count requiring proof of a prior conviction should be granted unless evidence of the prior conviction would be otherwise admissible. Petitioners do not rely on *Busic*, and, in our view, that decision is solely prospective in effect and thus does not aid petitioners. At all events, since the possibility that evidence of Foresta's prior conviction might have improperly affected the jury's verdict was minimized, this case does not present an appropriate occasion for the Court to consider any conflict between *Busic* and the decision below.

F.2d 594, 596 (9th Cir. 1976), cert. denied, 429 U.S. 1110 (1977); *United States* v. *Burkhart*, 545 F.2d 14 (6th Cir. 1976); *United States* v. *Smith*, 520 F.2d 544, 548 (8th Cir. 1975), cert. denied, 429 U.S. 925 (1976).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1980

APPENDIX

Nos. 78-5134-5-6-7-8-9-41-2-3 and 78-5074

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

PLAINTIFF-APPELLEE,

vs.

CARL SUTTON, JR., ET AL.,

DEFENDANTS-APPELLANTS.

[November 7, 1979]

ORDER

A majority of the judges of this Court in regular service have voted for rehearing of these cases en banc. Sixth Circuit Rule 14 provides as follows:

> The effect of the granting of a hearing en banc shall be to vacate the previous opinion and judgment of this court, to stay the mandate and to restore the case on the docket as a pending appeal.

Accordingly, it is ORDERED that the previous decision and judgment of this court is [*sic*] vacated, the mandate is stayed and these cases are restored to the docket as pending appeals.

The Clerk will direct the parties to file supplemental briefs and the cases will be scheduled during the February, 1980 session.

ENTERED BY ORDER OF THE COURT.

/s/ John P. Hehman
JOHN P. HEHMAN,
Clerk

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No. 79-1009

In the Supreme Court of the United States

OCTOBER TERM, 1979

HARRY ALEMAN and LEONARD FORESTA,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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I.

THIS COURT SHOULD RESOLVE THE IMPORTANT RICO ISSUES PRESENTED BY THIS CASE

(Reply to Pages 5-6 of Brief for the United States in Opposition to Writ of Certiorari)

The Government's view of the *Sutton* case places form over substance in relying upon the rule which vacates an opinion when rehearing *en banc* is granted. In view of the

fact that strong and well-reasoned dissenting opinions have been filed in three of the five circuits which have adopted the Government's view of RICO (see our Petition, pp. 14-15), the obvious fact that a division will exist among the judges in the Sixth Circuit regardless of the outcome in *Sutton,* and the Government's concession that it would recommend that certiorari be granted "on this important question" if the original opinion in *Sutton* survives rehearing (see Government's Supplemental Memorandum in *Little* v. *United States,* No. 79-5013), certiorari should be granted regardless of the outcome of the *en banc* rehearing in *Sutton.*

The Government has failed to respond to the important points raised in petitioners' brief on the RICO issue. The Government's brief in opposition does not deal with the fact that the Seventh Circuit majority opinion renders Section 1962 meaningless by prohibiting persons associated with a robbery "enterprise" from conducting the robbery "enterprise's" affairs through a pattern of committing robberies. (See Petition, p. 9.)* The Government's position ignores the substantial legislative history concerning Congressional intent and avoids any kind of analysis of the manner in which RICO was applied in the instant case. This Court should now address the important and far-reaching questions raised by the majority's construction of RICO in this case.

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* The Government's factual recitation misstates (p. 4) that Foresta and Aleman threatened the occupants at the Oak Lawn robbery. The Government's evidence was that the Oak Lawn robbery was committed by Foresta and the Government's witness, Louis Almeida, and Aleman was not alleged to have been present. (See 609 F.2d at 301-02.)

II.

SEPARATE SENTENCES FOR THE SECTION 1962 OFFENSES AND FOR THE UNDERLYING ACTS OF RACKETEERING VIOLATE THE DUE PROCESS AND DOUBLE JEOPARDY CLAUSES

(Reply to Pages 6-8 of Brief for the United States in Opposition to Writ of Certiorari)

The Government submits that separate sentences for the stolen property count and for the RICO counts do not violate the double jeopardy clause because the stolen property count did not have to be proved in order to establish the existence of the enterprise. The Government reasons that only two acts of racketeering activity are necessary for conviction and the evidence at trial showed three other acts of racketeering—the three robberies. However, it is impossible to determine what the jury based its decision on in convicting Mr. Aleman and Mr. Foresta of the racketeering counts. Mr. Aleman was alleged to have been present at only one of the three robberies charged, and even in that robbery, he was not identified by anyone. Thus, it is easily possible that the jury considered the stolen property count as one of the two acts of racketeering activity required for conviction under RICO.

This case is similar to cases in which courts have held that a failure of proof with respect to one element of a conspiracy requires reversal of the conspiracy count where it is not possible to determine the basis for the jury's guilty verdict. *E.g.,* in *United States* v. *Tarnopol,* 561 F.2d 466, 475 (3d Cir. 1977), the Court stated:

> "It follows that there was a failure of proof with respect to this particular alleged objective of the conspiracy. Accordingly, since we cannot know whether or not the jury based its verdict upon this objective alone, the verdict of guilty on Count I cannot stand."

Accord *United States* v. *Carmine,* 577 F.2d 556, 567 (9th Cir. 1978). *Compare United States* v. *Donner,* 497 F.2d 184, 190-91 (7th Cir. 1974), *cert. denied,* 419 U.S. 1047 *with United States* v. *Baranski,* 484 F.2d 556, 561 (7th Cir. 1973).

If the stolen property count was one of two acts on which the jury based its RICO verdict, then multiple punishments for this offense violate the Double Jeopardy Clause. Petitioners request that this Court reserve its decision on this point until it has decided *Whalen* v. *United States,* No. 78-5471 (argued November 27 and 28, 1979), in which a similar issue is raised.

III.

THIS COURT ERRED IN REFUSING TO SEVER COUNTS CHARGING FORESTA WITH TRANSPORTING AND POSSESSING A FIREARM AS A CONVICTED FELON

(Reply to Pages 6-8 of Brief for the United States in Opposition to Writ of Certiorari)

The Government contends that there was no abuse of discretion by the trial judge in trying the firearm offenses with the RICO counts and that petitioners have demonstrated no prejudice from the denial of severance. It further argues that the point relating to petitioners' offer to stipulate to the fact of a prior conviction after denial of the severance motion was not raised in the Court of Appeals and in any event, "as a general rule" the government is not required to accept an offer to stipulate.

In *United States* v. *Busic,* 587 F.2d 577, 585 (3d Cir. 1978), *cert. granted on other issues,* Nos. 78-6020, 78-6029 (June 4, 1979), the Court stated in dictum that in ruling on a pretrial motion to sever the district court should determine whether evidence of a prior conviction would be independently admissible on the other counts. If it is determined that the convictions would not be admissible, the *Busic* Court stated that the severance should be granted. The *Busic* Court held that the refusal to sever was harmless error, since the defendants raised the defense of entrapment and the evidence of their prior convictions was therefore admissible under Rule 404(b) of the Federal Rules of Evidence to rebut that defense. The *Busic* case is in direct conflict with the Seventh Circuit's opinion in the present case on this issue. The conflict should be resolved by this Court.

The Government's claim that Foresta did not raise the stipulation argument in the Court of Appeals is erroneous. In their argument to the Court of Appeals that the trial judge erred in admitting evidence of the conviction, petitioners stated:

> "After the motion to sever Counts VIII and IX were denied, defendants offered to stipulate to the fact that Mr. Foresta had been found guilty of a felony, and requested that the jury not be told that robbery was the specific charge. (Tr. 1294.)" (Petitioners' Brief in the Court of Appeals, pages 60-61.)

Petitioners then set forth in their brief the reasons why such evidence was inadmissible. The fact that the Seventh Circuit chose not to comment on this point raised in petitioner's brief does not foreclose petitioners from raising it again in their petition for certiorari. Although it may be true "as a general rule" that the government is not required to accept an offer of stipulation, the government and the trial judge had the obligation to protect petitioners' fundamental right to a fair trial, which required exclusion of the evidence of a prior robbery conviction of one of the defendants.

CONCLUSION

For the reasons stated above and for the reasons set forth in their Petition for Writ of Certiorari, petitioners respectfully request that this Court grant a writ of certiorari to review the judgment of the Court of Appeals for the Seventh Circuit in this case.

Respectfully submitted,

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